Supreme Court
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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-51

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,

Plaintiff-Respondent,

—v.—

YELLOWSTONE PARK LINES, INC., a corporation, and
YELLOWSTONE PARK COMPANY, a corporation,

Defendants-Petitioners.

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Petitioners submit this short reply brief in order to bring to this Court's attention certain new legislation and to reply to respondent's brief in opposition to the Petition.

New Legislation

Since petitioners filed their Petition for a Writ of Certiorari, Congress has proposed and adopted a number of amendments to the Fair Labor Standards Act of 1938 after a thorough review of the Act, its coverage and the exemptions. These amendments would have, if enacted and signed into law, extended the coverage of the Act. Congress specifically revoked several of the exemption provisions under Section 13(a). It is important to note, however, that Con-

gress left intact the exemption for employees of amusement or recreational establishments provided by Section 13(a)(3). This reinforces petitioners' contention that Congress purposely and consciously determined in 1966 that employees who were employed by recreational establishments should be exempt and that even today, when Congress favors even broader coverage of the Act, Congress still favors exemption for recreational employees. However, under the very narrow and restrictive interpretation of Section 13(a)(3) advocated by the Department of Labor and adopted by the Tenth Circuit, many employees of recreational establishments, even though those establishments meet the seasonal tests prescribed by Congress, will not be exempt because most recreational operations consist of two or more physically separate facilities.

Reply to Respondent's Brief

A. *Respondent's Statement Answered.*

The Solicitor General's brief points out, on p. 3, that the Secretary conceded below that all of petitioners' 2,300-2,500 employees are exempt except for approximately 200 central employees. This concession illustrates the absurdity of the Secretary's position and, indeed, of the decision of the Tenth Circuit. The District Court found, and the Tenth Circuit did not rule otherwise, that all those employed by Yellowstone are employed for the same purpose, namely, to provide recreation for the millions of visitors to Yellowstone Park. Moreover, all employees are hired by Yellowstone, are employed under the same Work Agreement, are assigned to its various facilities according to the needs of Yellowstone and are reassigned from

time to time to meet those needs. Under those circumstances it makes no sense to say that approximately 2,000 employees of Yellowstone are exempt while approximately 200 others are not exempt. Such a distinction is proper in those retail-wholesale cases cited by respondent on pages 4 and 5 of its brief, for in those cases certain of the employees of the company asking exemption under Section 13(a)(2) were retail employees who dealt directly with the public, whereas other employees were wholesale employees who worked in a warehouse and did not deal directly with the public. In contrast, all of Yellowstone's employees service and accommodate the public. There should be no difference, therefore, in the applicability to them of the Fair Labor Standards Act.

B. ***Respondent's Argument Answered.***

1. 1966 Amendments

In his brief in opposition to petitioners' Petition for a Writ of Certiorari, the Solicitor General acknowledges that Congress gave independent status to the amusement and recreational establishment exemption in 1966. He also notes that the amendment added two specific tests of seasonal operation. He concludes, however, that Congress intended the word "establishment" to have the same definition in Section 13(a)(3) as it has in Section 13(a)(2). This conclusion is, we submit, a non sequitur.

First, it should be noted that there is no definition of "establishment" in Section 13(a)(2). Second, Congress made an express determination in 1966 to set apart recreational establishments from retail establishments. Congress prescribed certain specific tests for each. In Section 13(a)(2), a retail establishment is defined as "an establishment

75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry." Section 13(a)(3) provides that an establishment is an amusement or recreational establishment "if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33⅓ per centum of its average receipts for the other six months of such year; . . . ". The two sections involve different operations, were adopted for different reasons (as more fully described in the Petition) and prescribe different tests. Therefore, rather than supporting the Solicitor General's contention, the specific act of Congress in 1966 in adopting a separate exemption for recreational establishments supports petitioners' contention that whatever meaning may have been given to "establishment" in Section 13(a)(2) by this Court's dictum in *Phillips Co.* v. *Walling*, 324 U.S. 490 (1945), should not determine the meaning of "establishment" in the recreational establishment exemption.*

2. Conflict in the Circuits

In discussing the decisions of the Sixth, Seventh and Eighth Circuits at pages 7 and 8 of his brief, respondent misses the point. Respondent states that the courts denied "retail establishment" exemptions to non-retail units of multi-unit retail enterprises on the ground that the units did not perform a "retail" function. Petitioners do not dis-

* However, even assuming *arguendo* that it should, the essential question still is: what test or tests should be applied to determine if several facilities constitute an "establishment". As this Court indicated in *Phillips*, the primary test is functional.

agree with this. However, the point is that these courts made that determination on the basis of the functional nature of the units and not on some physical or geographic test which was the sole test applied by the Tenth Circuit in this case. If the Sixth, Seventh and Eighth Circuits in those cases had applied a physical test, then those non-retail units would have been granted an exemption, a result which clearly would have been improper. If the Tenth Circuit had applied a functional test here rather than a physical test, all of petitioners' facilities would have been found to be a single establishment and all of their employees exempt under Section 13(a)(3).

3. Questions Presented

Petitioners should not be precluded from now arguing that employees who perform services for more than one exempt recreational establishment are exempt from the provisions of the Act. The Tenth Circuit implicitly found that each of Yellowstone's facilities constituted an exempt recreational establishment.* On the basis thereof petitioners are only asserting what logically follows, namely that employees who work at more than one of these exempt establishments are exempt. They are only asking this Court to consider a question which arose for the first time due to the decision of the Tenth Circuit. *Duignan* v. *U. S.*, 274 U.S. 195, 200 (1927); *Terminiello* v. *City of Chicago*, 337 U.S. 1 (1949); *In re Linda Coal and Supply Co.*, 255 F.2d 653 (3rd Cir. 1958).

* The stipulation referred to by respondent should not be a bar to the raising of this question. Petitioners and the Secretary entered into that stipulation to avoid the necessity of a prolonged trial concerned with a number of issues that were or may have been relevant to whether each of petitioners' separate facilities was an exempt establishment.

Moreover, the question of whether employees who are employed by two or more exempt establishments are exempt is "sufficiently closely related" (*Boynton* v. *Virginia*, 364 U.S. 454 at 457) to the question of whether the Yellowstone facilities either are an "establishment" or are rather several establishments that this Court may properly consider the question. The two questions are interrelated and interdependent and rest upon the definition of "establishment", and the answer to the second question is a corollary of the answer to the first. If this Court should find that all of Yellowstone's facilities are not one establishment, it should necessarily answer the second question in order to dispose of this matter.

CONCLUSION

For the reasons set forth in the Petition and herein, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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